

UNITED STATES OF AMERICA

Approved For Release 2001/09/03 : CIA-RDP84-00933R000400030040-3

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Federal Supply Service

Washington, DC 20406



December 27, 1976

STATINTL

ODP # 030/77

[REDACTED]
Chief, Procurement Management Staff
Office of Logistics
Central Intelligence Agency
Washington, DC 20505

STATINTL

[REDACTED]
This letter is forwarded to you in your capacity as a member of the Interagency Procurement Policy Committee.

The purpose of this letter is to bring to your attention two recent decisions of the Comptroller General of the United States which have broad application concerning the evaluation of fixed price options in the procurement of Automated Data Processing Equipment (ADPE) systems.

The Comptroller General has found that certain provisions of the Fixed Price Options clause contained in § 101-32.409-5 of the Federal Property Management Regulations (now superseded by the clause as prescribed by § 1-4.1108-4 of the Federal Procurement Regulations) are inappropriate and misleading to potential offerors.

We are taking action to issue a FPR Temporary Regulation which will address the issues raised, provide an interim policy, and request comments concerning a longer range solution.

In the meantime, we suggest that you review all applicable procurements using the referenced FPMR (FPR) provision to ascertain whether circumstances prevail that are similar to those associated with the protested procurements.

Copies of the referenced Comptroller General decisions, namely, B-186313, December 9, 1976, Burroughs Corporation and B-186940, December 9, 1976, Honeywell Information Systems, Inc., are available from the General Accounting Office (telephone 275-5308). The enclosure to this letter sets forth the pertinent portions of the Digests of these decisions for your use.

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This letter requires no response. However, if you have any questions, they may be directed to Roger W. Walker of our staff (telephone 557-2226) or to Roy B. Chisholm (telephone 566-0194) of GSA's Automated Data and Telecommunications Service.

Sincerely,



PHILIP G. READ

Director, Federal Procurement Regulations

Enclosure

Enclosure to IPPC letter regarding fixed-price options

PERTINENT PORTIONS OF DIGESTS

File : B-186313

Date: December 9, 1976

Matter of: Burroughs Corporation

1 through 5. [These portions are not pertinent.]

6. Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended systems life end. Payment of charges--a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"--would violate 31 U.S.C. § 665(a), 31 U.S.C. § 712a and 41 U.S.C. § 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory.

7. Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended systems life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability in violation of 31 U.S.C. § 665(a), 31 U.S.C. § 712a and 41 U.S.C. § 11.

8. If ADP contract is terminated for convenience of Government, payment of separate charges, which, by contract's provisions, are payable if Government returns equipment or otherwise terminates ADP system prior to intended 60-month systems life, would seem to be inconsistent with mandatory termination for convenience clause remedy, in that separate charges do not represent costs incurred in performance of work terminated and would clearly exceed basic contract's value.

9. Although some separate charges payable for termination of ADP system prior to intended system's multiyear life contained in contracts supported by fiscal year funds with multiple yearly options are illegal, it is proper to pay separate charges in cases where charges, taken together with payments already made, reasonably represent value of fiscal year requirements actually performed.

10. Inasmuch as payment of certain separate charges payable in event of termination of ADP system prior to intended multiyear life is illegal, indication in "fixed-price options clause" required to be included in such ADP procurements by Federal Property Management Regulation § 101-32.408-5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA.

File : B-186940 Date: December 9, 1976
Matter of: Honeywell Information Systems, Inc.

1. Statement in "fixed-price options" clause of Federal Property Management Regulations § 101-32.408-5 to effect that "separate charges" (that is, penalty to be assessed against Government for non-exercise of option rights) may be quoted in certain data processing procurements is inappropriate and misleading to potential offerors in contracts funded with fiscal year appropriations.
2. Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations.
3. RFP's "fixed-price options" clause failed to: inform offerors that certain charges may violate statutory restrictions; state how separate charges were to be specifically evaluated in determining whether charges made offer "unbalanced;" and warn as to how charges might improperly affect Government's flexibility in substituting equipment. Discussions with offeror did not cure failures nor give any indication that charges would be evaluated as ultimately done.
4. "Separate charges" cannot logically be added to base and option prices to determine successful offeror or to determine bid "unbalancing" since both prices and separate charges will not be paid--they are alternative in nature.
5. Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations.

TRANSMITTAL SLIP		DATE 3 January 1977
TO: Director of Data Processing		
ROOM NO. 2D0105	BUILDING Headquarters	
REMARKS: For your information only. <div style="text-align: center;"> <p><i>Eto</i> <i>CO</i></p> <p><i>DC/ms</i> <i>EB</i> <i>7</i> <i>done</i></p> <p><i>C/PdPG/ms</i> <i>ml</i> <i>Copy/please</i></p> <p><i>C/PdBG/ms</i> <i>R</i></p> </div>		
FROM: PMS/OL		
ROOM NO. 2G31	BUILDING <div style="background-color: black; width: 100px; height: 1.2em;"></div>	EXTENSION 8-8167

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FORM NO. 241
1 FEB 55

REPLACES FORM 36-8
WHICH MAY BE USED.

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